

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1767 OF 2004

Prakash Hemandas Javan,
an Indian Inhabitant,
residing at 106, "The Swing",
Marve Road, Malad (West)
Mumbai 400 064.

... Petitioner.

Versus.

1. The State of Maharashtra,
through the Secretary to the
Govt. of Maharashtra, Home
Department, Mantralaya,
Mumbai 400 032.
2. Neela Satyanarayana,
the Principal Secretary to the
Govt. of Maharashtra, Home
Department (Appeals and Security)
and Detaining Authority,
Mantralaya, Mumbai 400 032.
3. Union of India, through the
Joint Commissioner of Customs,
Chhatrapati Shivaji International
Airport, Sahar, Mumbai 400 099.
4. The Superintendent of Prison,
Nashik Road Central Prison,
Nashik.

... Respondents.

Shri Maqsood Khan for the Petitioner.

Ms.A.S.Pai, A.P.P. for the Respondent-State.

Shri H.V.Mehta, P.P. for Respondetn No.3.

**CORAM ; SMT.RANJANA DESAI, &
ABHAY S. OKA, JJ.**

DATED : 1st October, 2004.

ORAL JUDGMENT (Per Abhay S.Oka, J.)

1. By this petition under Article 226 of the Constitution of India, the Petitioner who is the brother of the detenu, has taken exception to the order of detention dated 13th April 2004 passed by the Respondent No.1 under the provisions of section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "COFEPOSA Act"). The order impugned was passed with a view to prevent the detenu in future from smuggling goods and acting in a manner prejudicial to the conservation of foreign exchange.

2. The challenge to the order of detention is pressed only on one ground. The said ground is non-consideration of Order dated 1st April 2004 passed by the learned Addl.Chief Metropolitan Magistrate, 3rd Court, Esplanade, Mumbai, in Notice No.73/N/2004 in R.A.No.108/RA/2003. By the said order, the learned Magistrate directed the Customs department to hand over the passport to the detenu and permitted the detenu to visit Dubai from 15th April 2004 for a period of one month on furnishing additional cash security of Rs.1 lakh subject to other conditions incorporated in the said Order.

3. Shri Khan, the learned Counsel appearing for the Petitioner pointed out that while passing the order of detention, the detaining authority had relied upon the order enlarging the detenu on bail which was passed prior to the order of detention. He submitted that the application for bail made by the detenu and the order granting bail were the vital documents which were referred to and relied upon by the Detaining Authority. He submitted that the subsequent order dated 1st April 2004 passed by the learned Magistrate is also a vital document as the learned Magistrate after recording the opposition by the Customs Department directed that the passport of the detenu should be returned to him and permitted the detenu to visit Dubai for a period of one month. He submitted that the said order substantially modifies the earlier order of the learned Magistrate granting bail in favour of the detenu. He submitted that the said order being a material and vital document ought to have been placed before the detaining authority. As the said document was not placed before the detaining authority, the subjective satisfaction of the detaining authority has been vitiated. He relied upon a judgment of the Division bench of this Court reported in 1997 IV LJ 453 (Anil Kesarinath Patil v/s. State of Maharashtra & others) which was followed by another Division Bench of this Court in the judgment dated 24th February 2004 delivered in Writ Petition

No.748 of 2003 (Sanjay Kumar v/s.the State of Maharashtra & others). He submitted that in case of Anil Kesarinath Patil (supra) the Division Bench of this Court has taken a view that the order of the learned Magistrate directing return of the passport to the detenu and granting permission to the detenu to go abroad for a limited period is itself a vital document.

4. Mrs.Pai, the learned A.P.P. appearing for the Respondent No.1, relied upon the affidavit of the detaining authority. The learned Counsel submitted that the Judgment of the Division Bench of this Court in the case of Anil Patil (supra) has been delivered by applying the ratio of the judgment of the Apex Court in the case Abdul Sathar Ibrahim Manik v/s. Union of India, reported in AIR 1991 SC page 2261. She submitted that the law laid down in the case of Abdul Sathar by the Apex Court has subsequently undergone a drastic change and the view now taken by the Apex Court is that whether the application for bail and the order granting bail in favour of a detenu are a vital documents or not depends on the facts and circumstances of each case. The learned A.P.P. relied upon the judgment of the Apex Court reported in 1994 Cr.L.J. page 602 (Noor Salman Makani v/s. Union of India & others), (1989) 1 S.C.C. page 250 (Haridas Amarchand Shah of Bombay v/s. K.L.Verma & others), and (2002) 6 S.C.C. page 735

(K.Varadharaj v/s. State of Tamilnadu & anr.) in support of her contention. She submitted that in the facts of the present case, the application for bail made by the detenu and the order passed thereon were not at all vital documents and therefore, the subsequent order of the learned Magistrate which had the effect of modifying the conditions imposed while granting bail cannot be a vital document. She submitted that as the law laid down by the Apex court in the case of Abdul Sattar has undergone change, both the judgments of the Division Bench of this Court in the case of Arun Patil and Sanjay Kumar (supra) do not lay down correct proposition of law.

5. We have carefully considered the rival submissions. We have also perused the various judgments cited by the learned Counsel appearing for the parties. We have perused the Affidavit-in-reply filed by the detaining authority. We have also been taken through the Affidavit made by Shri Sanjeev Kumar, Joint Commissioner of Customs, COFEPOSA Cell, on behalf of the Union of India. The detaining authority in the affidavit-in-reply has stated that :

. "It is submitted that at the time of issuance of the detention order, I was fully aware that the detenu was arrested on 22.11.2003 and was released on bail on

8.12.2003. I state that since I have referred and relied upon the order granting the bail to the detenu, copy of the same was furnished to the detenu along with the documents furnished to the detenu. I state that by virtue of the said order the detenu was ordered to be released on bail on his furnishing bail of Rs.1,50,000/- with one or two sureties of like amount or cash bail with the condition that he should not leave India without prior permission of the Court. I was also aware that the passport of the detenu was to remain with the department. I was also aware that the detenu was directed to attend the office of AIU Customs on 10 working days between 11 a.m. to 1.00 p.m. and the detenu was also directed not to indulge in any kind of criminal activities.

. I state that thus I was aware about the restrictions imposed upon the detenu by the Ld.Addl.C.M.M. while granting bail. I state that considering the prejudicial activities of the detenu as is apparent from the papers placed before me, I was subjectively satisfied that in spite of the restrictions imposed upon him by the learned Addl.C.M.M.

while granting bail to the detenu, unless prevented by taking the preventive action the detenu was likely to indulge in the similar prejudicial activities in future."

After stating that the order dated 1st April 2004 passed by the learned Addl.Chief Metropolitan Magistrate granting permission to the detenu to go abroad was not placed before him at the time of passing the order of detention, the detaining authority proceeded to state in the affidavit :

I state that on perusal of the said order dated 1.4.2004, it is apparent that by permitting the detenu to go abroad, the learned Magistrate has partially modified the order granting bail to the detenu. I state that the learned Magistrate has not given any reasons for granting permission to the detenu to go abroad which would have been relevant for the purposes of arriving at my subjective satisfaction. I state that I was aware that the detenu was resident of Dubai and his family was staying there and the learned Magistrate has merely permitted him to go to Dubai for a period of one month as the visa of his wife and son was to put an end. I

state that the learned Magistrate has not given any reason or expressed any opinion such as the detenu was going for his gainful purposes or he has been falsely implicated on the earlier occasion. I state that the said order is not at all vital document which would have affected my subjective satisfaction one way or the other hence, non placement and non consideration of the same cannot be said to have affected my subjective satisfaction."

6. In the light of the stand taken in the affidavit, we will have to consider the decision of a Division Bench of this Court in the case of Anil Kesarinath Patil (supra). The Division bench of this Court referred to the law laid down by the Apex Court in the case of Abdul Sattar (supra) and in particular sixth conclusion in para 12 of the said judgment of the Apex Court which reads thus:

"(6). In a case where detenu is released on bail and is at liberty at the time of passing the order of detention, then the detaining authority has to necessarily rely upon them as that would be a vital ground for ordering detention. In such a case the

bail application and the order granting bail should necessarily be placed before the authority and the copies should also be supplied to the detenu."

After referring to the said six conclusions in the Judgment of Abdul Sathar, the Division Bench proceeded to hold in paragraph 7 of the judgment as under:

"If the application for bail and the order granting bail has necessarily to be placed before the detaining authority and the copies thereof are required to be supplied to the detenu, the application for return of the passport for the purpose of going abroad and the order of the court directing the return of the passport and permitting the detenu to go abroad are, in our view, relevant material which would be vital for consideration by the detaining authority before arriving at the subjective satisfaction one way or the other whether to clamp down the order of detention on the detenu or not. The order for return of the passport and granting permission for going abroad would amount to the relaxation of the conditions of the original order of release

of the detenu on bail as passport was lying with the authorities which had curbed the freedom of the detenu to go abroad. There is a vital difference when the detenu is released on bail on his passport having been surrendered to the authorities, from the situation when the Court directs the return of the passport and permits the detenu to leave the country and go abroad. Like the order granting bail, the permission to go abroad pending prosecution would certainly be required to be considered by the detaining authority before issuing the order of detention."

Thus the Division Bench relying upon the Judgment of the Apex Court in the case of Abdul Sathar came to the conclusion that the application for bail and the order granting bail in favour of the detenu has to be necessarily placed before the detaining authority and copies thereof are required to be supplied to the detenu. The Division Bench further held that the order subsequently passed by the learned Magistrate for granting permission in favour of the detenu to travel abroad amounts to modification or relaxation of the conditions of the original order of release of the detenu on bail and therefore, the said subsequent order

becomes a vital document, which ought to be considered by the detaining authority before passing the order of detention. This Court came to the conclusion that the subjective satisfaction of the detaining authority was vitiated as a result of the non-consideration of the subsequent order passed by the learned Magistrate by which permission was granted to the detenu to travel abroad. The said judgment of the Division Bench has been followed by another Division Bench in the case of Sanjay Kumar (supra).

7. There is some substance in the contention raised by the learned A.P.P. that the Judgment in the decision in the case of Anil Kesarinath Patil (supra) is based only on the case of Abdul Sathar and the view taken in the case of Abdul Sathar has undergone a change subsequently. Reference will have to be made in that behalf to the Judgment of the Apex Court in the case of Noor Salman Makani (supra) in which the Apex Court held:

"Whether a particular document is vital or not again is an issue which depends on the facts in each case. The detention order itself was passed when the detenu was in jail and the detaining authority noted this fact and being satisfied that there was every possibility of his being released on

bail, passed the detention order. If subsequently the detenu is released on bail even subject to certain conditions that does not bring about any material change. On the other hand, release on bail is a stronger ground showing that the detenu who is not in custody is likely to indulge in the prejudicial activities again."

Reference will have to be made to the recent judgment of the Supreme Court in the case of K.Varadharaj (Supra). The Apex Court in the said case considered the law laid down in the case of Abdul Sathar as well as in the case of M.Ahamedkutty v/s. Union of India reported in (1990) 2 SCC page 1. The Apex Court came to the following conclusion :

"6. From the above observations, it is clear that placing of the application for bail and the order made thereon are not always mandatory and such requirement would depend upon the facts of each case. We are in respectful agreement with the view expressed by the abovesaid two judgments which in our opinion are not conflicting."

Therefore, the Apex Court was of the view that even the case of Abdul Sathar lays down that the placing of application for bail and the order made thereon before the detaining authority is always not mandatory and such requirement will depend on the facts of each case. The same is the view taken by the Apex Court in the case of Noor Salman Makani (supra). The decision of the Apex Court in the case of Noor Salman Makani (supra) was not brought to the notice of the Division Bench of this Court while deciding the case of Anil Kesarinath Patil (supra) and therefore, it appears that the Division Bench proceeded on the footing that in every case the application for bail and the order granting bail has to be placed before the detaining authority.

8. However, the law as pronounced by the Apex Court in the case of K.Varadharaj (supra) is very clear which lays down that whether the application for bail made by the detenu and the order granting bail thereon are vital documents or not depends on the facts of each case. In the light of this decision, we will have to examine the facts of the present case.

9. In the facts of the present case, it is an admitted position reflected from the order of detention and the affidavit-in-reply filed by the detaining authority that

the detaining authority was of the view that the Application for bail made by the Petitioner and order granting bail were vital documents and therefore, the said documents were not only referred to but the same were relied upon by the detaining authority. When the detenu applied for permission to go abroad, the said application was opposed by the Department and notwithstanding the opposition, the learned Magistrate permitted the detenu to go abroad to Dubai for a period of one month. In the order of detention passed against the detenu the allegation is that the detenu was a frequent visitor to Dubai and he had made 18 visits to Dubai. Inspite of opposition of the Department, the learned Magistrate permitted the detenu to visit Dubai for a period of one month. Considering the nature of allegations made against the Petitioner in the order of detention, we are of the opinion that in the facts of the present case, application made by the detenu for seeking permission to travel abroad and the order made thereon were vital documents and therefore, ought to have been placed before the detaining authority. Non placing of the said documents and the resultant non-consideration thereof by the detaining authority has therefore vitiated the order of detention.

10. The learned A.P.P. tried to submit that the application and the order have been considered by the

detaining authority while considering the representation made by the detenu against the order of detention. However, the subsequent consideration of the said order while considering the representation made by the detenu will not cure the earlier defect. If the subjective satisfaction of the detaining authority is vitiated as a result of non-placement and non-consideration of the vital documents, the order of detention becomes vulnerable and therefore, the subsequent consideration of such vital documents will not make the order of detention lawful. In the result the petition succeeds, and we pass the following order:

11. The Petition is allowed in terms of prayer clause (a) of the petition. We accordingly order that the detenu Vijay Hemandas Java shall be released forthwith unless otherwise required in connection with any other case.

(Smt.Ranjana Desai, J.)

(Abhay S.Oka, J.)